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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-499

ANGELO MASCIA,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**Petition for Rehearing**

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## Petition for Rehearing

The petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari, entered on January 10, 1972, and (2) granting the petition. As grounds for this motion petitioner states the following:

### The Recent Decision by the United States Court of Appeals for the Ninth Circuit, *Greene* v. *United States*, Is in Direct Conflict with That of the Second Circuit in This Case

On November 23, 1971, the United States Court of Appeals for the Ninth Circuit, in *Greene* v. *United States*, 10 Cr.L. 2225, decided the very question raised by this peti-

tion and reached a result squarely opposite to that of the Second Circuit below.* The Ninth Circuit in *Greene* held that the trial court *does have* the power to dismiss an indictment *solely* because of the government's extensive participation in and promotion of the crime charged in the indictment.

The reasoning of the Court in *Greene,* in reversing the convictions and dismissing the indictments, is equally applicable to the instant facts. At page 7 of its opinion the Court stated:

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. . . . But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative."

The facts in the instant case and *Greene* are strikingly similar. In *Greene,* a Treasury Agent acting in an undercover role was found to have encouraged and promoted the criminal activities of an illegal liquor operation. In the instant case, there are in effect two government agents acting in undercover capacities: Ruggiero, the IRS agent, who, while alone with petitioner, initiated, promoted and encouraged the bribe payment by numerous threats and repeated harassment and Williams, the corrupt tax adviser and subject of the IRS investigation, who was encouraged, aided and promoted by Ruggiero and the IRS in his plan and agreement with Ruggiero to compel the

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* The *Greene* opinion was not available to petitioner's counsel in time to bring it to this Court's attention on the petition for certiorari.

payment from petitioner, his own client, which Ruggiero later shared with him. For purposes of this case, the prosecution conceded that pursuant to existing legal authorities Williams was deemed to be a government agent because his conduct was adopted by IRS (311, gov't br. Court of Appeals, p. 13). Not only was the government's participation extensive, but the prosecution also conceded that the facts established IRS had initiated the bribe payment (398-400, gov't br. Court of Appeals p. 13). It is submitted that the complete record of the instant case, as outlined in the petition herein, demonstrates that the government's promotion and participation in the crime charged exceeds even that in the *Greene* case.

Thus, the sole question presented both in *Greene* and in the instant case is whether or not the trial court has the power to dismiss an indictment where it determines the government's participation in the crime charged is so extensive and intensive as to be repugnant to the principles of American criminal justice. The Ninth Circuit holds that the trial court not only has the power but is required to dismiss an indictment under such circumstances, whereas the Second Circuit, both in the instant case and in other recent cases such as *United States* v. *Groob*, (11/17/71), and *United States* v. *Braver*, (10/28/71) holds that the trial court has no such power. The Second Circuit below applied the traditional entrapment limitations and declined to examine the government's conduct except in relation to that of the defendant. But as held in *Greene*, the issue raised here is different from the entrapment defense. The Ninth Circuit in *Greene*, in determining that defendant was predisposed to commit the crime charged because of a recent prior conviction, recognized that the traditional entrapment defense was not available. Nevertheless, separate and apart from entrapment, it held the government's promotion and encouragement of the crime charged in itself required a dismissal of the indictment.

On the facts of the instant case, if this trial had been held in the Ninth Circuit the indictment would have unquestionably been dismissed. The trial court here, distressed by the facts of this case, gave a lengthy opinion (Petition, Appendix B, pp. 25-35) which foreshadowed the reasoning of the Court in *Greene,* the trial court referring to the facts here as involving ". . . impermissable use of police power." and the government ". . . promoting the commission of a crime." (Pet. p. 25). The trial court stated that on the instant facts it wanted to direct an acquittal based *solely* on IRS' conduct in aiding and encouraging the tax adviser known to IRS to be corrupt in coercing a payment from his client, the petitioner (537, 547). Reluctantly, however, the trial court concluded that it did not have such power. The Second Circuit's affirmance is now in direct conflict with the Ninth Circuit on an important and substantial question of substantive criminal law as to the extent of the trial court's power, which conflict should be settled by this Court.

## CONCLUSION

**For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.**

Respectfully submitted,

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